Supreme Court of the United States,
October Term, 1895.

No. 1,

CENTRAL NATIONAL BANK OF BOSTON, and others,

Plaintiffs in Error,

against

AARON R. STEVENS, THE UNION TRUST COMPANY OF NEW YORK, THE LEBANON SPRINGS RAILROAD and others,

Brief for the Defendants in Error.

IN SUPPLEMENT TO THE BRIEF FILED ON THE MOTION TO DISMISS OR AFFIRM. NUMBER 808 OF OCTOBER TERM, 1895.

Supreme Court of the United States.

NUMBER 38 OF OCTOBER TERM, 1897.

CENTRAL NATIONAL BANK OF BOSTON and others, plaintiffs in error,

against

AARON R. STEVENS, THE UNION TRUST COMPANY OF NEW YORK, THE LEBANON SPRINGS RAILROAD and others.

BRIEF FOR THE DEFENDANTS IN ERROR.

IN SUPPLEMENT TO THE BRIEF FILED ON THE MOTION TO DISMISS OR AFFIRM. NUMBER 568 OF OCTOBER TERM, 1895.

Cases recently adjudged by the Court.

Since this case was argued below the following cases, adjudged by the Court, have been reported:

Moran *v.* Sturges, 154 U. S. 256.
Shields *v.* Coleman, 157 U. S. 168.
In re Chetwood, 165 U. S. 443.
In re Johnson, 167 U. S. 116.

Moran v. *Sturges* was this: On the thirty-first of a certain July a proceeding was brought in the Supreme Court of New York to dissolve and administer the assets of a New York corporation which owned a fleet of towing steamboats, and a receiver was appointed.

On the *next* day—the first of August—libels, to enforce mariners' liens, were filed in the District Court of the United States and warrants issued to the Marshal.

The Marshal took possession first and held it.

The Court held that, *because of the possession being taken first*, the District court had the right to administer the property—although the proceeding in the Supreme Court of New York was the first begun.

Of course both proceedings were *in rem.*

It is true that in that case the jurisdiction was not concurrent—but the jurisdiction of the Federal court was exclusive—the State court having no authority to displace the maritime liens or in any manner to adjudge anything about them.

BUT *it is equally true*, as we claim, *that* in this case also *the jurisdiction is not concurrent, but that the State court had and has exclusive jurisdiction of the cause of action involved in this case.*

This will later appear.

The Court, speaking by Mr. Chief Justice Fuller, said: (154 U. S. 270.) "So, in *Dietzsch* v. *Huidekoper*, 103 "U. S. 494, a plaintiff in a replevin suit brought in a State "court had properly removed it to the Federal court and "obtained a judgment there in his favor, but the State court "proceeded to try the cause and render judgment against "the plaintiff, notwithstanding the removal, and *an ac-* "*tion was then brought in the State court upon the re-* "*plevin bond.* It was held that the court of the United "States might enjoin the prosecution of such action, *the* "*relief being merely ancillary to the jurisdiction al-* "*ready acquired and necessary to give effect to its own* "*judgment.*"

(P. 273.) "It will be perceived that the principle in- "voked in such cases as *Gaylord* v. *Railroad Company* "and *Insurance Company* v. *Howell*, *supra*, is, that

"courts for the purpose of protecting their jurisdiction "over persons and subject-matter may enjoin parties who "are amenable to their process and subject to their juris- "diction from interference with them in respect of prop- "erty in their possession, or identical controversies there- "in pending, by subsequent proceedings as to the same "parties and subject-matter in other courts of concurrent "jurisdiction."

(P. 274.) "It is a rule of general application that "where property is in the actual possession of one Court "of competent jurisdiction such possession cannot be dis- "turbed by process out of another Court. This doctrine "has been repeatedly affirmed by this Court."

(P. 283.) "As between two Courts of concurrent and "co-ordinate jurisdiction, having like jurisdiction over "the subject matter in controversy, the Court which first "obtains jurisdiction is entitled to retain it without inter- "ference, and cannot be deprived of its right to do so "because it may not have first obtained physical posses- "sion of the property in dispute. *But where* the juris- "diction is not concurrent, and *the subject matter in "litigation in the one is not within the cognizance of "the other, while actual or even constructive possession "may, for the time being, and in order to avoid un- "seemly collision, prevent the one from disturbing such "possession, yet where there is neither actual nor con- "structive possession there is no obstacle to proceeding, "and action thus taken cannot be invalidated by rela- "tion.*"

By Mr. Justice Brewer (p. 286):

"And I may say that I agree further, that *when a "Court has possession of property it may restrain the "bringing of any suit in any other Court to disturb that "possession*, and that an order for such restraint operates

"upon all persons within its jurisdiction, and can be "enforced, if need be, by proceedings as for a con- "tempt."

Italics are ours.

Shields v. *Coleman* (157 U. S., 168), was this:

On the sixth of a certain June a bill was filed in the Circuit Court of the United States by a creditor of a railroad company alleging the insolvency of the company, and a receiver was appointed, who took possession of the railroad.

On the eighth of June, the railroad company giving a bond, the court discharged the receiver and delivered the railroad into the possession of the company.

On the twenty-eighth of the following October a bill was filed in the State court by another creditor, also alleging the insolvency of the company, and a receiver was appointed by the State court, who took possession of the railroad and kept it until it was taken from him on the fourteenth of the following November, by a receiver appointed, as next follows:

On the 12th of November following, the Circuit Court of the United States—in the suit which had been begun on the 6th of June—restored its receivership and appointed another receiver who, on the 14th of November, took the railroad from the possession of the receiver who had been appointed by the State court.

It will be observed that while the State court got possession first, the suit in the Federal court was begun first. Of course, the proceedings were identical in kind and the jurisdictions concurrent.

The Court held (157 U. S. 168—all the Justices concurring):

"A Circuit Court of the United States has not the power "to appoint a receiver of property already in the pos-

" session of a receiver duly and previously appointed by a " State court, and cannot rightfully take the property out " of the hands of the receiver so appointed by the State " court.

"The mere forcible continuance of possession wrong- " fully acquired by the Federal court does not transform " that which was in the first instance wrongful, into a " a rightful possession." (Head note, 157 U. S. 169.)

In *this* case, as will presently be shown, the railroad was in the possession of the State court, by its receiver, although the suit in the Federal court was the first begun.

In re Chetwood, 165 U. S. 443, the Court said, by Mr. Chief Justice Fuller, p. 460:

" The doctrine is firmly established that where the ju- " risdiction of a court, and the right of a plaintiff to " prosecute his suit in it. have once attached, that right " cannot be arrested or taken away by proceedings in " another court, *and that where property is actually in* " *the possession of one court of competent jurisdiction,* " *such possession cannot be disturbed by process out of* " *another court of concurrent jurisdiction.* *Moran* v. " *Sturges*, 154 U. S. 256 and cases cited."

Italics are mine.

In *Re Johnson*, 167 U. S. 116, the Court said, by Mr. Justice Brown (p. 125):

" We know of no reason why the rule, so frequently " applied in cases of conflicting jurisdiction between Fed- " eral and State courts, should not determine this ques- " tion. Ever since the case of *Ableman* v. *Booth*, 21 " How. 506, it has been the settled dotrine of this Court " that a court having possession of a person or property " cannot be deprived of the right to deal with such person " or property until its jurisdiction is exhausted, and that " no other court has the right to interfere with such cus-

" tody or possession. This rule was reaffirmed in *Tarble's* " *case*, 13 Wall, 397; in *Robb* v. *Connolly*, 111 U. S. 624; " and *In re Spangler*, 11 Michigan, 298; and with refer- " ence to personal property has been so often restated as " to have become one of the maxims of the law. *Taylor* " v. *Carryl*, 20 How. 583; *Freeman* v. *Howe*, 24 How. " 450; *Ellis* v. *Davis*, 109 U. S. 485; *Kippendorf* v. " *Hyde*, 110 U. S. 276; *Covell* v. *Heyman*, 111 U. S. " 176; *Byers* v. *McAuley*, 149 U. S. 608; *Moran* v. " *Sturges*, 154 U. S. 256; *In re Chetwood*, 165 U. S. " 443."

Abstract or Statement of the Case.

There was a mortgage upon the railroad to secure bonds to the aggregate of two millions of dollars. This mortgage was made to the Union Trust Company of New York as trustee.

One Sackett, who owned about nine thousand dollars of these bonds, brought an action, in the Supreme Court of New York, to which he made parties only the owner of the equity of redemption behind twenty-five millions of dollars of mortgages, and a trespasser who was in possession.

NOT the Union Trust Company and NOT any of the mortgagees.

That is to say, *he did not make a party of any one who had any real interest in the property.*

These twenty-five millions of dollars of mortgages came about in this way.

The Union Trust Company had brought an action to foreclose the two million mortgage, and got a regular judgment of foreclosure and sale under which the railroad was put up for sale, and a sale made—that is, if there can be a sale where the purchase money is not paid. A deed was made to the person who bid off the railroad—BUT *no part of the purchase money was ever paid.*

The person to whom that deed was given deeded the railroad to the New York, Boston and Montreal Railway Company which made the mortgages for the twenty-five millions of dollars. Of course as against that railway company the mortgages were good. It is that railway company which Sackett made a party to his suit.

The judgment in this action sweeps away all of these things, and adjudges that the original judgment of foreclosure and sale, got by the Union Trust Company, be enforced and that there be a re-sale under it.

Sackett got a receiver, who put out the trespasser—took possession, and then proceeded to issue certificates to the amount of three hundred and fifty thousand dollars, the proceeds of which he and the receiver and his other friends mostly divided up around among themselves. They then got a final judgment, against the owner of the equity of redemption behind the twenty-five millions of mortgages, and the trespasser, under which they sold the railroad, *subject to the principal of the receiver's certificates which the purchasers assumed to pay*, the sale bringing *just enough* to pay the *interest* on the certificates and the other debts of the receivership, *not a cent over*.

The principal coming due, the Central Bank of Boston—now plaintiff in error,—being the owner of the most of the certificates—brought an action in the Supreme Court of New York, against the purchasers, for a sale of the railroad and to charge the purchasers with any deficiency. It is plain that to this action the purchasers could not have any possible defense—except payment—of which there is no pretense. They moved the action into the Circuit Court of the United States, because of the diverse citizenship of the parties, and there it resulted in the decree which the judgment in this action enjoins them from proceeding under. The decree was for the sale of the railroad and over against the purchasers personally for any deficiency.

Matters being in this state, and *before* any advertisement for the sale of the railroad under that decree, this action was brought and in it a receiver was appointed who took possession of the railroad, and is still in possession when the record closes.

This sufficiently appears—the receiver is a witness and swears that he is in possession under an order in this action. This testimony was given in the month of June, 1891 (Record, pp. 449-50, 434). But it is said to have been read from "said printed case" (pp. 434, 448), and it appears that "said printed case" is the printed case "used at general term upon appeal from the first judgment" (p. 120), and by the report of that first appeal (*Stevens* v. *Union Trust Co.*, 57 Hun, 499), it

appears that that "first judgment was entered 24 January, 1890. It may be that I have no right to use this report; but, however that may be, it sufficiently appears that the receiver was in possession on the month of June, 1891. By the judgment in this action the receiver is continued and he is directed, upon the confirmation of the sale, to deliver possession to the purchaser and account to the court (Record, p. 115), and he is also for certain purposes made a party to the action (Record, pp. 118–119). That sale was not consummated by the delivery of the deed until 16 May, 1892, while the deed on the sale under the decree of the Circuit Court of the United States, was delivered 25 April, 1892 (Record, pp. 520–527). It thus appears that the receiver *was in possession when the sale was made under that decree.*

By the judgment in this action the judgment in the Sackett suit and all the proceedings in it, including the order for the issue of the certificates, *are reviewed and reversed* (Record, p. 113), and the sale under it is specifically set aside (p. 113). The usual injunction against any interference with the property by anybody claiming under that sale accompanies the reversal of the judgment and the setting aside of the sale and in particular, the certificate holders, plaintiffs in error here, *are enjoined from proceeding with the sale under the decree of the Circuit Court of the United States* (p. 114).

This is the great matter complained of.

Matters being in this condition, Mr. Peter Butler, as receiver of the Pacific National Bank of Boston, a party to this action, applied to Judge Wallace for an order directing the referee, notwithstanding the injunction, to proceed with the sale under the decree of the Circuit Court of the United States, and Judge Wallace made such an order (See his opinon, Papers on Motion to Dismiss or Affirm, pp. 74–80; 49 Fed. Rep., 293). And thereupon the referee sold to the defendant Foster, consummating the sale by a deed which was delivered 25 April, 1892 (Record, pp. 520–527), and the sale was confirmed by the Circuit Court of the United States. (Papers on Motion to Dismiss or Affirm, p. 98).

Afterwards the sale under the judgment in this action was made, also to the defendant Foster (Record, pp. 520–527), and the defendant Foster thereupon deeded all he

had got under both sales to the Lebanon Springs Railroad, a corporation, which thereupon moved in the Court of Appeals of New York to affirm the judgment in this action, and is one of the defendants in error here (Record, pp. 520–527).

A statement of the facts in full detail is given in the brief submitted on the motion to dismiss or affirm.

BRIEF OF THE ARGUMENT.

I.

If the relief against the sale under the decree of the Circuit Court of the United States cannot be given in this action it cannot be given at all—and the result is a complete failure of justice.

So far as this question is concerned, this action is a bill of review of the judgment and proceedings in Sackett's suit, that is to say, a judgment and proceedings of the Supreme Court of New York.

No such matter could possibly have been raised in the suit in the Circuit Court of the United States. Even if the defendants in that action had been otherwise in position to raise it, they would have been prevented from doing so by their contract by which they not only bought subject to the certificates, but *expressly agreed to pay them.*

But that is not all.

There is not any way in which an action could be brought in the Circuit Court of the United States in which such a matter could have been determined. The parties

could not possibly have been arranged so as to give jurisdiction by reason of citizenship,

> I suppose I have a right to have this presumed, in support of the judgment, from the absence of proof to the contrary, but whether that or no, the citizenship of enough of the parties can be picked out from the record to show this.

and the review and reversal of the judgment and proceedings in the Sackett suit does certainly *not* present any Federal question.

And even were it possible to so arrange the parties as to give the Circuit Court of the United States jurisdiction of such an action, *it has not yet been done.* On the other hand by the Supreme Court of New York *it has been done.* And surely that court is, out of all courts in the world, *the most appropriate* court to review and reverse one of its own judgments.

It follows then that the Sackett judgment has been rightly reviewed and reversed and the sale under it rightly set aside, and it further follows that any proceeding based upon that sale ought to be enjoined.

The court below having full jurisdiction of the matter has so decided, and it is to be supposed that every court would so decide.

But if it be right that such a proceeding should be enjoined, it cannot make any difference in what court it is.

It is the *proceeding* which ought to be enjoined, not the court. Suppose it had not happened that we had bought at the sale made by the Federal court? The result would have been that the judgment in this action would have settled nothing. The litigation would have gone on interminably, with this added difference, that the sale under the decree of the Federal court being unquestionable—as it must be if there be anything in the argument—and this judgment being right, as it must here be assumed to be, there would have been a deadlock forever. As the Court said in *Dietsch* v. *Huidekoper*, 103 U. S. 494: "*If the bill is not maintainable, the appellees would*

"*find themselves in precisely the same plight as if the* "*judgment of the United States Circuit Court in the* "*replevin suit had been against them instead of for* "*them.* The judgment in their favor would settle noth- "ing. Instead of terminating the strife between them "and their adversaries, it would leave them under the "necessity of engaging in a new conflict elsewhere. This "would be contrary to the plainest principles of reason "and justice" (p. 498).

Unless, therefore, there be an absolute want of jurisdiction, the injunction ought to stand.

That there is not such an absolute want of jurisdiction has been settled by the Court.

Marshall *v.* Holmes, 141 U. S. 589, was this: Mrs. Marshall owning lands in Louisiana, one Babcock, pretending to be her agent by virtue of a letter which it was claimed that she had written to him, under certain process of that State, charged her lands with a lot of judgments in favor of one Mayer. Mrs. Marshall thereupon brought a suit by petition in the State court of Louisiana, alleging that she had never written the letter and that the whole thing was a fraud. This suit, under the power given by the then Act of Congress, she moved into the Circuit Court of the United States and from the latter court an injunction issued.

The Court, speaking by Mr. Justice Harlan, said (141 U. S. 599):

"These authorities would seem to place beyond ques- "tion the jurisdiction of the Circuit Court to take cog- "nizance of the present suit, which is none the less an "original, independent suit, because it relates to judg- "ments obtained in a court of another jurisdiction. While "it cannot require the State court itself to set aside or "vacate the judgments in question, it may, as between "the parties before it, if the facts justify such relief, ad-

" judge that Mayer shall not enjoy the inequitable advan-
" tage obtained by his judgments. A decree to that effect
" would operate directly upon him, and would not con-
" travene that provision of the statute prohibiting a court
" of the United States from granting a writ of injunction
" to stay proceedings in a State court. It would simply
" take from him the benefit of judgments obtained by
" fraud."

The ruling in the case of *Dietzsch* v. *Huidekoper*, 103 U. S. 494, is thus described by the Court, speaking by Mr. Chief Justice Fuller, in *Moran* v. *Sturges*, 154 U. S. 270.

" So in *Dietzsch* v. *Huidekoper*, 103 U. S. 494, a plain-
" tiff in replevin suit brought in a State court had prop-
" erly removed it to the Federal court and obtained a
" judgment there in his favor, but the State court pro-
" ceeded to try the cause and render judgment against the
" plaintiff, notwithstanding the removal, and *an action*
" *was then brought in the State court upon the replevin*
" *bond.* It was held that the court of the United States
" *might enjoin the prosecution of such action, the relief*
" *being merely ancillary to the jurisdiction already*
" *acquired and necessary to give effect to its own judg-*
" *ment.*"

Italics are mine

But is not this relief merely ancillary to the jurisdiction already acquired—namely, the jurisdiction to set aside the judgment in the Sackett suit and the sale under it—and necessary to give effect to this, its own judgment?

This question has long been settled in England.

Carron Iron Co. *v.* McLaren, 5 HLC, 416, by
Lord Cranworth, 439
by Lord St. Leonards, 452–455.

And—confining what is now to be said solely to the question of jurisdiction, and assuming that the injunction

would have been not only entirely proper, but that equity would have required it to issue, if the decree of the Circuit Court of the United States had been a judgment of the Supreme Court of New York—I do submit this:

There is not anything in the Constitution of the United States which takes away from the Supreme Court of New York its power to pronounce a judgment upon parties over whose persons it has jurisdiction, in a case as to which exclusive jurisdiction of the subject matter has not been granted to the Federal courts.

And there is thus not anything to prevent it from pronouncing a judgment enjoining the parties before it from proceeding in the courts of the United States.

II.

The railroad being in the actual possession of the Supreme Court of New York, that court had the right to protect its possession by the injunction.

This is a somewhat narrower ground than the other, but entirely well settled by the Court.

In *Moran* v. *Sturges*, 154 U. S. 256, and *Shields* v. *Coleman*, 159 U. S. 168, the court held that the court which first obtained the actual possession of the property had the right to administer it, although in both cases the proceeding in the other court had been first begun.

And in *Moran* v. *Sturges*, Mr. Justice Brewer said (154 U. S. 286): "And I may say that I agree further that "when a court has possession of property it may restrain

"the bringing of any suit in any other court to disturb "that possession, and that an order for such restraint "operates upon all persons within its jurisdiction, and "can be enforced, if need be, by proceedings as for a con- "tempt."

And in *Re Johnson*, 167 U. S. 116, the court used the language already quoted.

For the detail of the argument, and as to the other assignments of error, the Court is respectfully asked to read the brief on the motion to dismiss or affirm.

The judgment should be affirmed.

EDWARD WINSLOW PAIGE,
Of Counsel.

MOTION

In the Supreme Court of the United States,

OCTOBER TERM, 1895.

NUMBER 568.

THE CENTRAL NATIO[illegible]L BANK OF BOSTON and o[illegible]ers,
Plaintiffs in Error,

against

AARON R. STEVENS, IDA S. HARRISON, THE LEBANON SPRINGS RAILROAD and others,
Defendants in Error.

MOTION TO ADVANCE.

This case is pending on a writ of error to the Court of Appeals of New York and the return to that writ.

The action was brought to enforce a judgment and two decrees, made more than twenty years ago, foreclosing a mortgage upon the Lebanon Springs Railroad. The railroad had been sold under that judgment and those decrees to a purchaser who had not paid the purchase money, but nevertheless had got his deed—and under the color of that deed the railroad had been sold four times and mortgaged again and again. The judgment in this action swept away a great mass of conveyances, mortgages and receiver's

certificates—the entanglements of the title during twenty years—and adjudged the enforcement of the original foreclosure judgment and decrees, and a resale of the railroad under them—thus restoring the property to the lien of the original mortgage.

The railroad was bought at the sale by a reorganization Trustee, who, in the execution of his trust, conveyed it to the Lebanon Springs Railroad, a New York corporation and one of the defendants in error.

The Federal question is this:

An action had been brought in the Supreme Court of New York to foreclose one of the junior liens—a lien originally created by an order and continued by a judgment of that Court. This action was removed into the Circuit Court of the United States by reason of the citizenship of the parties, and in due time proceeded to a decree foreclosing the lien and directing the sale of the railroad under it, and that sale was being advertised at the time the judgment in this action was made.

The judgment in this action swept away the lien itself, which the decree of the Circuit Court of the United States foreclosed, and which, as has been originally stated, owed its origin wholly to the Supreme Court of New York; and as an incident to that relief, *it enjoined* all the parties to the action, included in whom were *all the parties to the decree in the Circuit Court of the United States, from proceeding with the sale under that decree.*

The question was thus presented whether the Supreme Court of New York can, *under any circumstances*, enjoin parties before it from proceeding under a decree which they have got in the Circuit Court of the United States.

This is the Federal question, and though, doubtless, in the abstract a question of great importance, it is to the parties to this action of not the slightest consequence:

Because, notwithstanding that injunction, the Circuit

Court of the United States directed the Master to go on with the sale under the decree. The Master did so. The sale was made, and to the same reorganization trustee, who, in the execution of his trust, conveyed the title thus acquired as well as that which he acquired under the judgment in this action, to the Lebanon Springs Railroad, one of the defendants in error.

To the Lebanon Springs Railroad, now the only party in interest among the defendants in error, it is therefore of no sort of consequence whether the part of the judgment which adjudged the injunction be reversed or whether it be affirmed. In either event it owns all the title which that decree could give.

> The theory which the plaintiffs in error have expressed, is this: Their decree, besides adjudging the sale of the railroad, was also for the deficiency on the sale against William Foster, Jr., one of the defendants below, personally. They say that Mr. Foster now claims that the sale, being in violation of the injunction, was void, and that, unless the part of the judgment which adjudged the injunction be reversed, the sale being thus void, *the amount of the deficiency will still remain unascertained, and they cannot issue execution against Mr. Foster for the deficiency since, they do not know what the deficiency is.*
>
> To this there are the following answers:
>
> Mr. Foster was the reorganization trustee above referred to. He bought at the sale under that decree, and paid his money, which was received by the plaintiffs in error, and which they still retain. Mr. Foster then sold to the defendant in error—The Lebanon Springs Railroad—and was paid the money agreed upon, which he still retains. Under these circumstances it will hardly be permitted to either of them to question the validity of their deeds *as against their own grantee*, and quite certainly *not while they both keep the money.*
>
> Another answer—If the plaintiffs in error cannot issue an execution against Mr. Foster, because the amount of the deficiency is not ascertained, this will not prevent them from suing him at law for the whole debt.

We ask that the case be advanced, because a long-pending litigation relating to an entire railroad cannot be terminated until the questions now presented are determined, but will then be finally disposed of. The rights asserted by the plaintiffs in error constitute a cloud upon the title of the entire railroad—and wholly prevent the financing of the reorganized railroad and even the payment of the taxes; under sales for which title to more than three-fourths of the railroad will pass to the pur-

chasers at the tax sales before this case can be reached in its regular order.

Notice of this motion has been duly served upon counsel for the plaintiffs in error and proof of service filed with the Clerk.

EDWARD WINSLOW PAIGE,
Counsel for Defendants in Error.

March, 1896.

THE CENTRAL NATIONAL BANK OF BOSTON and others,
Plaintiffs in Error,

against

AARON R. STEVENS and others.

BRIEF FOR DEFENDANTS IN ERROR ON MOTION TO AMEND THE MANDATE.

Those parts of the opinion of the Court, which we submit to be pertinent to this motion, are annexed. We submit that they show that the Court intended to reverse the judgment in the two particulars only which are described in it. The mandate, however, commands the reversal of the whole judgment.

The defendants in error move to amend the mandate so that it conform to the opinion.

It is the opinion of the counsel who signs this brief that it is decidedly for the interest of the defendants in error that the motion be denied.

And for the following reasons:

The whole judgment being reversed—there must inevitably under the laws of New York, be a new trial of the whole action. As the defendants in error might succeed in the new trial in all matters except those described in the opinion of the Court—as to be reversed—there would be a general judgment in favor of the defendants in error like the present judgment, except that it would omit the injunction and the provision about the plaintiffs in error proving their certificates. Under that judgment there would

of course be a new sale and the bondholders could then buy through the medium of a trustee other than Mr. Foster, thus relieving the case from the difficulty described by the italicised portions of the parts of the opinion annexed.

It would also relieve the defendants in error from paying the costs of the Court, since there is not any way under the laws of New York by which a successful plaintiff can be made to pay costs to the defendant.

And they can also show, although as we submit the present record shows, that not any of the proceeds of the certificates went into the property—nevertheless we make the motion.

EDWARD WINSLOW PAIGE,
Of Counsel.

Come now the defendants in error and move the Court that the annexed mandate be amended so as to command that the judgment below be reversed only in the particulars described in the opinion of the Court.

IN THE SUPREME COURT OF
THE UNITED STATES.

Ninth of May, one thousand eight hundred and ninety-eight.

Extracts from the Opinion

(169 U. S. 432,)

(p. 456): "The certificates were sold, and the proceeds "expended under the approval of the Court."

(p. 458): "Thus the singular result, thus far reached, "of this protracted and expensive litigation, *is that Fos-* "*ter*, who had with Hazard been the purchaser at the "Sackett sale, *has become the owner of the railroad upon* "*the payment of a merely nominal sum, and that the* "BONDHOLDERS and the owners of the certificates *have* "*realized nothing.* And it further thus appears that ever "since May 16, 1892, the controversy has really been be- "tween the holders of the receiver's certificates and "*Foster, who has, for a trifling sum, become the owner* "*of the railroad as improved by money procured by the* "*sale of the certificates.*

"*It may be that Foster, when he bought under the de-* "*cree of sale, in the present suit, did so in pursuance of* "*some arrangement with the bondholders and* AS THEIR "TRUSTEE. But whether Foster, when he bought under "the decree of the Circuit Court of the United States, "subjected himself to that feature of the decree that "made him personally liable for the unpaid portion of the

"certificates, and precluded himself from relying on the "decree of the Supreme Court of New York setting aside "the Sackett sale, and whether the setting aside of the "sale in the Sackett suit would invalidate receiver's cer- "tificates issued years before *and whose proceeds had "gone into the improvement of the property*, and whether, "in case of Foster's inability to respond to his personal "obligation, the unpaid portion of the certificates would "be a lien on the railroad in his hands *and in those of "his vendees*, are questions for the Circuit Court of the "United States, which cannot be withdrawn from its de- "termination by the subsequent proceedings in the Su- "preme Court of New York. Any confusion that might "otherwise have arisen by reason of conflicting views be- "tween the Federal and state courts has been prevented "by the fact that *Foster*, who himself originally invoked "the jurisdiction of the Circuit Court of the United States, "*has become the purchaser of the railroad under the de- "crees of both courts, whereby the only substantial con- "troversy that remains is between him, as such pur- "chaser, and the holders of the certificates.*"

The opinion ends (p. 465) with these words:

"The conclusions we have reached are that the judg- "ments of the Supreme Court of New York and of the "Court of Appeals affirming the same are erroneous in so "far as they command the Central National Bank of "Boston, the Massachusetts Mutual Life Insurance Com- "pany and other holders of the receiver's certificates, "whose rights, as such holders, were adjudged by the "Circuit Court of the United States, to appear before the "referee appointed by the Supreme Court in the present "case, and which enjoin the Central National Bank of "Boston and others, whose rights have been adjudged by "the Circuit Court of the United States for the Northern

"District of New York, from proceeding with the sale "under the decree of that court, are erroneous.

"*The judgment of the Supreme Court of New York* "*and of the court of Appeals, in these particulars, are* "*accordingly reversed, and the cause is remanded to* "*that court for further proceedings not inconsistent* "*with the opinion of this court.*"

Mandate.

UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA:

To the Honorable the Judges of the Court of Appeals
(L. S.) *of the State of New York*, GREETING:

WHEREAS, lately in the Court of Appeals of the State of New York, before you or some of you, in a cause between The Central National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler, as Receiver of the Pacific National Bank of Boston, *et al.*, Appellants, and Aaron R. Stevens, Harper W. Rogers, Nancy E. Wilbur, Andrew A. Douglas, as trustee under the last will and testament of William Henry Douglas, deceased, and Ida S. Harrison, respondents, wherein the judgment of the said Court of Appeals, entered in said cause on the 27th day of November, A. D. 1894, is in the following words, viz.:

"On the 27th day of November, 1894, judgment was duly given and rendered in and by said Court of Appeals whereby the said judgment of the said Supreme Court was in all things affirmed with costs."

as by the inspection of the transcript of the record of the said Court of Appeals which was brought into the Supreme Court of the United States by virtue of a writ of error sued out by said appellants agreeably to the act of Congress, in such case made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-seven, the said cause came on to be heard before the SUPREME COURT OF THE UNITED STATES on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said Court of Appeals in this cause be, and the same is hereby reversed with costs; And that the said appellants recover against the said respondents, Aaron R. Stevens *et al.*, One thousand and forty seven dollars and seventy cents, for their costs herein expended and have execution therefor.

And it is further ordered that this cause be and the same is hereby remanded to the said Court of Appeals for further proceedings not inconsistent with the opinion of this Court.

MARCH 7, 1898.

And the same is hereby remanded to you the said Judges of the said Court of Appeals of the State of New York, in order that such execution and further proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 13th day of April, in the year of our Lord one thousand eight hundred and ninety-eight.

COST OF APPELLANTS.	
Clerk.....	$453.70
Printing record..	574.00
Attorney.....	20.00
	$1,047.70

JAMES H. MCKINNEY,
Clerk of the Supreme Court of the United States.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

COSTS OF THE CENTRAL NATIONAL BANK OF BOSTON ET AL.

In No. 38.

1894.	October Term—Docketing cause and filing record $5.00; appearance .25; filing precipe .25; filing papers $1.00; continuance .25	6.75
1895.	October Term—Transfer $1.00; filing papers $2.50; filing briefs $5.00; submission .20; continuance .25	8.95
1896.	October Term—Transfer $1.00; appearance .25; filing precipes and receipts $1.50; filing papers $3.25; filing stipulation .25; continuance .25	6.50
1897.	October Term—Transfer $1.00; appearance .25; filing precipes .50; filing papers $5.00; filing briefs $5.00; argument .20; judgment $1.00, filing same .25; recording .40; mandate $5.00; preparing record for printer etc. $412.50; cost of printing record, $574.00; attorneys docket fee, $20.00; costs and copy .40	1025.50
		$1047.70

Fee Book, page 15, 841.

Test: JAMES H. MCKENNEY,
Clerk Supreme Court U. S.

SIR:

You will take notice that the motion above described will be made to the Supreme Court of the United States in the Capitol on the ninth day of May, one thousand eight hundred and ninety-eight, at the opening of the Court, or as soon as counsel can be heard.

Yours very truly,

EDWARD WINSLOW PAIGE,
Attorney for the defendants in error.

To Mr. ALPHEUS T. BULKELEY,
Attorney for the plaintiffs in error.